Gabung Trading Sdn Bhd v Borneo Pulp & Paper Sdn Bhd

HIGH COURT (KUCHING) — COMPANIES WINDING-UP NO 28–27 OF 2002–III(I)
CLEMENT SKINNER J
31 MAY 2007

Civil Procedure — Service — Foreign company — Service of liquidator's application — Whether leave of court to serve out of jurisdiction necessary

Companies and Corporations — Winding up — Liquidators — Application to make a call on one of the contributories — Companies Act 1965 ss 245, 252 — Companies (Winding Up) Rules 1972 rr 73, 74

Pursuant to ss 245 and 252 of the Companies Act 1965 ('the Act') read together with rr 73 and 74 of the Companies (Winding Up) Rules 1972 ('the Winding Up Rules'), the liquidator of the respondent company Borneo Pulp & Paper Sdn Bhd ('BPP1'), applied for the following orders; (i) that the liquidator be at liberty to make a call on Asia Pulp & Paper Company Ltd ('APP'), Singapore for the total amount of RM117,000,000; (ii) that in the event of failure by APP to settle the amount of RM117m, the liquidator was at liberty to charge APP interest at the rate of four centum per annum from the date of judgment to date of payment. The grounds for the application were that; (a) the call was to satisfy the debts and liabilities of BPP1 and or to pay the costs, charges and expenses of winding-up BPP1; and (b) to facilitate the adjustment of rights of the contributories of BPPl amongst themselves (APP being the only remaining contributory that had yet to pay its liability in respect of unpaid shares). APP opposed the application on the following grounds; (i) the service of the liquidator's application, made by way of summons-in-chambers ('SIC'), on APP at Singapore was defective, in that, no leave of court to serve the SIC out of the jurisdiction had been obtained under O 11 r 9(4) Rules of the High Court 1980 ('RHC'). Therefore, service was a nullity; (ii) the service of two notices by the liquidator on APP, namely, the notice to contributories of appointment to settle list of contributories dated 17 March 2003 ('the first notice to contributories') and notice to contributories of final settlement of list of contributories and that his name is included dated 2 April 2003 ('the final notice to contributories') were defective, in that, they were incorrectly addressed to APP in Singapore and therefore not received; (iii) APP's claimed to be entitled to a set off against its liability for unpaid capital; (iv) the application by the liquidator was made in

bad faith and in abuse of the process of court as the liquidator had acted in concert with other creditors of BPP1 to exert pressure on APP at a time when APP was involved in a dispute in a related company called Borneo Pulp Plantations Sdn Bhd ('BPP2 dispute').

Held:

(1) While r 18 of the Winding-Up Rules may concern the mode of service, s 339(c) of the Act relates to the service itself of any document which will include a summons, and specifically refers to service of a document on a foreign company by either leaving it at or sending it by post to the foreign company at its registered office in the place of its incorporation. The Act and the Winding Up Rules having made specific provisions relating to service on a foreign company of which APP was one, it would exclude the parallel provisions in the RHC. Therefore the service of the SIC on APP was not defective or a nullity (see paras 19–20).

(2) Regarding the sending of the first notice to contributories of 17 March 2003 and final notice to contributories of 2 April 2003 to APP's incorrect address in Singapore, the far more important question to ask was: Did APP suffer substantial injustice or prejudice as a result of the notices being sent to APP's City House address? According to APP it had suffered prejudice because the notices were meant to notify APP of crucial meetings where APP's financial fate was to be decided. If APP genuinely regarded the contributories' meeting as crucial to its financial fate and had felt gravely prejudiced at not receiving the first and final notice to contributories as alleged, then it was open to APP to apply to court pursuant to rr 70, 71 and 193 of the Winding-Up Rules to object to the list of contributories finally settled by the liquidator, but no such steps was taken by APP (see paras 30 & 33).

(3) As for setting off its capital contributions against what it was owed by BPP1, it was not open in law for AP to contend that it might unilaterally set off credit amounts from its liability for the unpaid capital. Section 245(1) of the Act provided that until all creditors of BPP1 had been settled in full leaving only the position of an adjustment between contributories, APP did not have a right of set-off on its liability on a call for the unpaid capital. The total assets of BPPl without the unpaid share capital of APP, amounted to about RM150m would on the face of it be insufficient to meet the total allocation for secured and unsecured creditors amounting to about RM216.43m (secured creditors — RM87.22m plus unsecured creditors - RM 129.21m) (see paras 38–39).

(4) With regard to the liquidator's letter of 4 November 2003 which APP

had held up as illustrative of the liquidator's acting on the instructions of the other contributories, the liquidator had explained that his letter was written in the context of the position arising under the framework agreement and the stance taken by APP as to its liability on the unpaid capital in the BPP2 dispute. Further, taking into account that the ultimate adjustment in the framework agreement arising from a formal call being made would affect the other contributories of BPP1, the liquidator said he sought their views on making the call. The court accepted the liquidator's explanation for writing that letter as a reasonable one. The court also found that the liquidator had not timed the call to coincide with the BPP2 dispute as alleged. As the facts show, it was APP's stand in the BPP2 dispute about a formal call having to be made on it to crystallise its liability as contributory to pay the RM 117,000,000 that precipitated this application (see para 52).

[Bahasa Malaysia summary

Mengikut ss 245 dan 252 Akta Syarikat 1965 ('Akta tersebut') dibaca dengan kk 73 dan 74 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah Penggulungan'), penyelesai syarikat responden Borneo Pulp & Paper Sdn Bhd ('BPP1'), memohon untuk perintah-perintah berikut; (i) bahawa penyelesai dibenarkan membuat panggilan ke atas Asia Pulp & Paper Company Ltd ('APP'), Singapura untuk jumlah RM117,000,000; (ii) bahawa sekiranya APP gagal menyelesaikan jumlah RM117j tersebut, penyelesai dibenarkan mengenakan faedah pada kadar empat peratus setahun ke atas APP dari tarikh penghakiman sehingga pembayaran. Alasan-alasan untuk permohonan adalah; (a) panggilan tersebut adalah untuk memenuhi hutang-hutang dan liabiliti-liabiliti BPP1 dan atau untuk membayar kos, caj-caj dan perbelanjaan penggulungan BPPl; dan (b) membolehkan satu penyelarasan hak-hak dan penyumbang-penyumbang BPP1 sesama sendiri (APP merupakan penyumbang yang tinggal yang masih belum membayar liabiliti-liabilitinya berhubungan dengan saham-saham yang belum dibayar). APP membantah permohonan tersebut atas alasan-alasan; (i) penyerahan permohonan penyelesai melalui saman dalam kamar ('SDK'), kepada APP di Singapura adalah cacat, iaitu, tiada kebenaran mahkamah diperolehi untuk menyampaikan SDK tersebut diluar bidangkuasa di bawah A 11 k 9(4) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Dengan itu penyampaian adalah terbatal; (ii) penyampaian dua notis-notis oleh penyelesai kepada APP, iaitu notis kepada penyumbang akan perlantikan untuk menyelesaikan senarai penyumbang-penyumbang bertarikh 17 Mac 2003 ('notis pertama kepada penyumbang-penyumbang') dan notis kepada penyumbang-penyumbang akan penyelesaian terakhir senarai penyumbang-penyumbang dan bahawa namanya termasuk bertarikh 2 April 2003 ('notis terakhir penyumbang-penyumbang') adalah cacat, iaitu, ia salah

dialamatkan kepada APP di Singapura dan dengan itu tidak diterima; (iii) APP menyatakan ia berhak untuk tolakan terhadap liabilitinya untuk modal yang tidak dibayar; (iv) permohonan penyelesai adalah dibuat secara berniat jahat dan menyalahgunakan proses mahkamah oleh kerana penyelesai telah bertindak bersama-sama dengan pemiutang-pemiutang BPP1 yang lain untuk menekan APP pada masa apabila APP sedang terlibat dengan satu pertikaian dengan syarikat yang berkaitan iaitu Borneo Pulp Plantations Sdn Bhd ('pertikaian BPP2').

Diputuskan:

(1) Sementara k 18 Kaedah-Kaedah Penggulungan berkaitan dengan cara penyampaian, s 339(c) Akta tersebut berhubung dengan penyampaiannya sebarang dokumen yang termasuk saman, dan merujuk secara khusus penyampaian dokumen kepada syarikat asing dengan cara sama ada meninggalkannya di sana atau menghantarkannya melalui pos kepada syarikat asing tersebut pada pejabat berdaftarnya di tempat penubuhannya. Akta tersebut dan Kaedah-Kaedah Penggulungan setelah membuat peruntukan-peruntukan berhubung dengan penyampaian kepada syarikat asing khususnya yang mana APP adalah satu-satunya, ia akan mengenepikan peruntukan-peruntukan yang sama di KMT. Dengan itu penyampaian SDK kepada APP tidak cacat ataupun terbatal (lihat perenggan 19–20).

(2) Berhubungan dengan penyampaian notis pertama kepada penyumbang-penyumbang bertarikh 17 Mac 2003 dan notis akhir kepada penyumbang-penyumbang bertarikh 2 April 2003 kepada alamat yang salah di Singapura, soalan yang lebih penting untuk ditanyakan ialah: Adakah APP mengalami ketakadilan yang besar atau prejudis hasil daripada notis-notis tersebut dihantarkan ke alamat APP's City House? Menurut APP, ia telah mengalami prejudis oleh kerana notis-notis tersebut adalah untuk memaklumkan kepada APP akan mesyuarat-mesyuarat yang penting tersebut di mana nasib kewangan APP akan diputuskan. Sekiranya APP benar-benar menganggap mesyuarat penyumbang-penyumbang sebagai penting kepada nasib kewangannya dan telah merasai bahawa ia telah diprejudiskan dengan tidak menerima notis pertama dan terakhir kepada penyumbang-penyumbang seperti yang dikatakannya, maka ia dibuka kepada APP untuk memohon kepada mahkamah menurut kk 70, 71 dan 193 Kaedah-Kaedah Penggulungan untuk membantah kepada senarai penyumbang-penyumbang yang telah ditetapkan secara muktamad oleh penyelesai-penyelesai, tetapi tiada langkah-langkah sedemikian diambil oleh APP (lihat perenggan 30 & 33).

(3) Berhubungan dengan tolakan sumbangan-sumbangan modalnya terhadap apa yang dihutangkannya oleh BPP1, ia tidak terbuka di bawah undang-undang untuk AP menyatakan bahawa ia mungkin dapat menolak secara sepihak jumlah liabilitinya dengan modal yang belum dibayar. Seksyen 245(1) Akta tersebut memperuntukkan bahawa sehingga kesemua pemiutang-pemiutang BPP1 dibayar sepenuhnya meninggalkan hanya penyesuaian di antara penyumbang-penyumbang, APP tidak mempunyai hak tolakan di atas satu panggilan untuk modal yang belum dibayar. Jumlah aset-aset BPP1 tanpa saham modal APP yang belum dibayar, berjumlah kepada lebih kurang RM150j akan di atas permukaan tidak mencukupi untuk dibahagikan di antara pemiutang-pemiutang yang bercagar dan tidak bercagar berjumlah lebih kurang RM216.43 juta (pemiutang-pemiutang bercagar — RM87.22j campur pemiutang-pemiutang yang tidak bercagar — RM129.21j) (lihat perenggan 38–39).

(4) Berhubungan dengan surat penyelesai-penyelesai bertarikh 4 November 2003 yang APP telah mempamerkannya sebagai tindakan penyelesai-penyelesai yang bertindak di atas arahan-arahan penyumbang-penyumbang, penyelesai-penyelesai telah menjelaskan bahawa surat yang ditulisnya adalah di dalam konteks kedudukan yang berbangkit di bawah perjanjian rangka dan pendirian yang diambil oleh APP berhubungan dengan liabilitinya atas modal yang belum dibayar di dalam pertikaian BPP2 tersebut. Lanjutan, dengan mengambil kira penyesuaian akhir di dalam perjanjian rangka yang berbangkit daripada panggilan yang formal dibuat akan menjejaskan penyumbang-penyumbang BPP1 yang lain, yang dikatakan penyelesai telah mendapatkan pandangan mereka dalam membuat panggilan tersebut. Mahkamah menerima penjelasan penyelesai dalam menulis surat tersebut sebagai munasabah. Mahkamah telah mendapati penyelesai tidak tetapkan panggilan tersebut untuk berbetulan dengan pertikaian BPP2 seperti yang dikatakan oleh APP. Oleh kerana fakta-fakta menunjukkan bahawa ia adalah pendirian APP di pertikaian BPP2 akan satu panggilan yang formal dibuat kepadanya untuk penghabluran liabiliti-liabilitinya yang mengakibatkan permohonan ini (lihat perenggan 52).]

Notes

For cases on foreign company, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6187–6189.

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1205–1243.

Cases referred to

Fairview Schools Bhd v Indrani a/p Rajaratnam [1998] 1 MLJ 99 (refd)
Leal v Dunlop Bio – Processes Ltd [1984] 2 All ER 207 (refd)

Overend, Gurney & Co, Re [1865-1866] 1 LR Ch. App 528 (refd)
Sheilds Marine Insurance Association, Re [1868] 5 Eq 368 (refd)

Legislation referred to

Companies Act 1965 ss 4(1), 215, 218(1)(e), 245, 252, 339(c)
Companies (Winding-Up) Rules 1972 rr 18, 69, 70, 71, 73, 74, 91(1), (2), 92, 193, 194(1)
Interpretation Act 1967 s 3
Rules of the High Court 1980 O 2 r 1, O 11 r 9(4)

Lim Heng Choo (Lim & Lim) for the liquidator/applicant
George Lo (Geoge Lo & Partners) for the petitioner and also two contributories ie, Sarawak Timber Industries Development Corporation and State Financial Secretary Incorporated
Sandhu Singh (Sandhu & Co) for liquidator of Borneo Pulp Plantation Sdn Bhd
Sunny Si (Si & Associates) for contributory Asia Pulp & Paper Co Ltd

Clement Skinner J:

[1] This is the hearing of an application by Mr Yew Fooi, the liquidator of the respondent company Borneo Pulp & Paper Sdn Bhd ('BPP1'), pursuant to ss 245 and 252 of the Companies Act 1965 ('the Act') read together with rr 73 and 74 of the Companies (Winding Up) Rules 1972 ('the Winding-Up Rules'), for the following orders:

(1) that the said liquidator of BPPl be at liberty to make a call on Asia Pulp & Paper Company Ltd ('APP') of 69 Loyang Drive, Singapore 508958 for the total amount of RM117,000,000;

(2) that in the event of failure by APP to settle the amount of RM117m, the liquidator is at liberty to charge APP interest at the rate of four centum per annum from the date of judgment to date of payment;

(3) such further or other orders be made or given as this honourable court deem just; and

(4) costs of and occasioned by this application be provided for. The grounds of this application are that:

(a) the call is to satisfy the debts and liabilities of BPPl and or to pay the costs, charges and expenses of winding-up BPPl; and

(b) to facilitate the adjustment of rights of the Contributories of BPPl amongst themselves (APP being the only remaining contributory that has yet to pay its liability in respect of unpaid shares).

[2] APP opposes the application and seeks to resist it on the following grounds:

(i) The service of the liquidator's application, made by way of summons-in-chambers ('SIC'), on APP at Singapore is defective, in that, no leave of court to serve the SIC out of the jurisdiction had been obtained under O 11 r 9(4) Rules of the High Court 1980 ('RHC'). Therefore, service was a nullity;

(ii) The service of two notices by the liquidator on APP, namely, the notice to contributories of appointment to settle list of contributories dated 17 March 2003 ('the first notice to contributories') and notice to contributories of final settlement of list of contributories and that his name is included dated 2 April 2003 ('the final notice to contributories') were defective, in that, they were incorrectly addressed to APP in Singapore and therefore not received;

(iii) APP's claim to be entitled to a set off against its liability for unpaid capital.

(iv) this application is made in bad faith and in abuse of the process of court as the liquidator has acted in concert with other creditors of BPP1 to exert pressure on APP at a time when APP was involved in a dispute in a related company called Borneo Pulp Plantations Sdn Bhd ('BPP2 dispute').

[3] Before addressing the merits of the application and each of the grounds raised by APP, some background information will be useful.

[4] On 26 June 1996 APP and the Sarawak Timber Industry Development Corporation ('STIDC') entered into two agreements, namely (1) a Joint Venture Agreement ('JV agreement') to undertake a project which called for the establishment of commercial tree plantations ('Industrial Forest Lands') so as to produce a sustainable supply of pulpwood as raw material to feed a pulp mill which would be built to manufacture pulp, accordingly the respondent, BPP1 was formed to own, develop and operate a Pulp Mill, manage and develop the Industrial Forest Lands and process pulpwood harvested from the Industrial Forests; and (2) a shareholders agreement to regulate the rights and obligations between the parties in relation to BPP1 as well as another company set up for the purposes of the project called Borneo Pulp Plantation Sdn Bhd ('BPP2'). In BPP1, APP held the majority share or 60% while Borneo Pulp Plantation Sdn Bhd (ie, BPP2) held 20%, STIDC held 10% and the State Financial Secretariat Incorporated (or 'SFS1') held 10% shares respectively.

[5] The obligation of STIDC under the shareholders agreement in relation to BPP1 were to:

(i) cause leases of plantation land or Industrial Forest Lands with no less than 200,000 hectares of nett plantation area and with a tenure of 60 years to be alienated to BPP2 by the State Government of Sarawak;

(ii) cause BPP2 to sublease the plantation or Industrial Forest Lands to BPP1 for 59 years 11 months on substantially the same terms and conditions as the leases from the State Government; and

(iii) cause licences for planted forests to be issued by the State Government to BPP1 for rights to develop tree plantations on the Industrial Forest Lands.

[6] The obligations of STIDC under the JV agreement in relation to BPP 1 were to procure a lease of land from the State Government for the construction and operation of the Pulp Mill.

[7] Pursuant to the terms of the Shareholders Agreement STIDC did cause 28 parcels of Industrial Forest Lands covering some 205,958 hectares to be alienated by the State Government to BPP2 on the basis that BPP2 would allot and treat as paid up, its shares to the value of RM105,450,496 to STIDC. BPP2 in turn sub-leased the Industrial Forest Lands to BPPl for 59 years 11 months at a total rental of RM105,448,007 the amount of which was to be satisfied on the basis that BPPl would allot, issue and treat as paid up progressively, its shares to BPP2 to the value of RM105,448,007 in accordance with the Memorandum of Sub-Lease dated 19 June 1997 ('the sub-lease') and the subsequent additional extensions and/or variations thereunder.

[8] The 28 parcels of Industrial Forest Lands were subsequently charged by BPP2 to a syndicate of lenders with Utama Merchant Bank Bhd acting as agent of the lenders, to secure the aggregate sum of RM250,000,000 lent to BPPl. APP's obligations under the JV Agreement in relation to BPP1 were to:

(i) udertake the construction and establishment of the Pulp Mill;

(ii) establish the tree plantations;

(iii) undertake the overall management and control of the operations of the Pulp Mill;

(iv) ensure the Pulp Mill shall have a production capacity of at least 750,000 metric tonnes per annum; and

(v) arrange for all the financing.

[9] Out of the some 200,000 hectares of tree plantations to be established, APP established some 16,019 hectares or 8%. Construction of the Pulp Mill was not started although site clearing and preparatory works were carried out.

[10] On 2 March 2001, APP declared a unilateral worldwide moratorium on payment of all its debts totalling about USD14b.

[11] In May 2002, the Industrial Forest Lands were resumed by the State Government of Sarawak ('the resumption exercise'). On resuming the lands the State Government made an award of compensation of some RM133m from which was deducted at source RM121m being premium still outstanding. The balance was paid to the lenders who were chargees of the Industrial Forest Lands. The proceeds of the resumption exercise including the amounts representing the lease premiums gave rise to issues between the liquidator here and the liquidators of BPP2 and other contributories of BPP2, which will be referred to again.

[12] On 5 August 2002 the lenders placed BPP1 under receivership pursuant to a debenture. On 20 November 2002 BPP1 was ordered to be wound up by this court pursuant to s 218(1)(e) of the Act on the ground that it was unable to pay its debts.

[13] On 15 January 2003 BPP2 was ordered to be wound up in Companies Winding Up No 28–33 of 2002-III(I). With that I return to consider the application before me.

Was service of the SIC defective?

[14] The liquidator caused the SIC to be served on APP in Singapore by sending the same by AR Registered post addressed to APP at 3, Shenton Way No 25-01 Shenton House, Singapore 068005, as well as at 69, Loyang Drive Singapore 508958. The SIC sent to APP at 69 Loyang Drive, Singapore was duly received while that sent to 3, Shenton Way, No 25-01, Shenton House, Singapore was returned by the postal authorities.

[15] APP says the liquidator should have obtained leave of court to serve the SIC on it in Singapore pursuant to O 11 r 9(4) RHC. That rule states:

> Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with leave of the court.

[16] APP contends that failure on the part of the liquidator to obtain the leave referred to in the rule renders the service a nullity which is not capable of being cured. I do not agree. APP relies on the provisions of the RHC to

press home its point but it is my view that the application before me is made under and pursuant to provisions of the Companies Act 1965 and the Winding-Up Rules which contain specific provisions relating to service. Section 339(c) of the Act states:

> Service of Notice
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> Any document required to be served on a foreign company shall be sufficiently served —
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> (a) ...;
>
> (b) ...;
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> (c) in the case of a foreign company which has ceased to maintain a place of business in Malaysia if addressed to the foreign company and left at or sent by post to its registered office in the place of its incorporation.

And r 18 of the Companies-Winding Up Rules 1972 states:

> Mode of Service
>
> Except as otherwise provided by the Act or these Rules at any order —
>
> (a) all notices, summonses and other documents except those of which personal service is required shall be deemed to be sufficiently serviced if left at or sent by prepaid post to the last known address of the person to be served therewith or the address (if any) at which the person has authorised service on him to be effected; …

[17] APP contends that the abovementioned provisions of the Act and the Winding Up Rules are of no assistance to the liquidator being only provisions for determining the mode of service. I do not agree. While r 18 may concern the mode of service, s 339(c) of the Act relates to the service itself of any document which will include a summons, and specifically refers to service of a document on a foreign company by either leaving it at or sending it by post to the foreign company at its registered office in the place of its incorporation.

[18] In *Fairview Schools Bhd v Indrani a/p Rajaratnam* [1998] 1 MLJ 99 at p 106, the Federal Court held:

> … we think that where the Winding Up Rules make specific provisions for a particular matter, it would exclude a parallel provision in the rules of the court but where the Winding Up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists.

[19] Applying the reasoning in that case here, the Act and the Winding-Up

Rules having made specific provisions relating to service on a foreign company of which APP is one, it would exclude the parallel provisions in the RHC. For completeness, the word 'person' used in r 18 of the Winding Up Rules is defined in s 3 of the Interpretation Act 1967 as including a body of persons, corporate or unincorporated and s 4(1) of the Act defines 'Corporation' to mean 'any body corporate formed or incorporated or existing within Malaysia or outside Malaysia and includes any foreign company.

[20] I accordingly find that service of the SIC on APP was not defective or a nullity as alleged. It was regular and effective. Even if I am wrong in what I say above and leave of court was required pursuant to O 11 r 9 RHC to serve the SIC on APP at Singapore, then I would regard the failure to obtain leave as an irregularity and not a nullity under r 194(1) of the Winding-Up Rules which states that:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court.

[21] If the liquidator required to obtain leave to serve the SIC under O 11 r 9(4) RHC but did not obtain it, O 2 r 1 of the RHC gives the court the power to make good the service by granting that leave retroactively. In *Leal v Dunlop Bio - Processes Ltd* [1984] 2 All ER 207 at pp 212 and 215 the court said:

> I accordingly do not share the judge's doubt whether the failure to get the court's leave to serve this writ out of the jurisdiction is an irregularity which the court has the power to cure. It is a failure to comply with a requirement of O 11 r 1 …
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> … Leave of the court for permission to serve a writ out of the jurisdiction is as clearly a requirement or O 11 r 1 as leave of the court for the issue of a writ which is to be served out of the jurisdiction is a requirement of O 6 r 7 …
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> … Each rule requires the leave of the court in different language. I have come to the conclusion that O 2 r 1 gives the court the power to make good the service of the writ and the judge could have given leave retroactively.

[22] Under r 194(1) of the Winding Up Rules as well as O 2 r 1 RHC the court can act to cure an irregularity if no substantial injustice or prejudice has been occasioned by the irregularity. On the facts before me I have not found that APP has suffered any such injustice or prejudice although APP complains that the liquidator had deliberately avoided applying for leave to serve out of the jurisdiction because the liquidator would have had to make full disclosure to the court in his ex-parte application that he had not sent to

APP the first and final notice to contributories at APP's correct address and, in the absence of APP's presence on the date and at the place and time appointed to settle the final list of contributories, he would not be able to satisfy the court that there was a quorum for the contributories' meeting.

[23] Even if the first and final notice to contributories had not been sent to APP's correct address as alleged, for the reasons I give shortly when addressing the point, I find that no prejudice or substantial injustice was occasioned to APP.

2. The sending of the first notice to contributories of 17 March 2003 and final notice to contributories of 2 April 2003 to APP's incorrect address in Singapore.

[24] APP says that prior to 3 March 1993 its registered address was at 36 Robinson Road, #18-01 City House, Singapore 068877 ('the City House address'). From 3 March 1998 to 24 January 2000 its registered address was 1 Maritime Square, #10-01 (Lobby B), World Trade Centre, Singapore 099253 (the 'World Trade Centre address'). From 24 January 2000 to 28 April 2003 its registered address, was at 118, Pioneer Road, Singapore 639598 (the 'Pioneer Road address'). From 28 April 2003 to present its registered address is at 69, Loyang Drive Singapore, 508958 (the 'Loyang Drive address').

[25] The first notice and final notice to contributories were dated 26 March 2003 and 2 April 2003 respectively. APP complains that at the material time period ie, 24 January 2000 to 28 April 2003, its registered address was the Pioneer Road address, but the liquidator sent the two notices aforementioned to the City House address. According to APP it would have been a simple matter for the liquidator to have done a fast and cheap computer search of the database of the Singapore Registry of Companies to ascertain APP's correct address at the material time but had not done so. Instead, APP says the liquidator knowingly and wilfully sent the aforementioned notices to the wrong address. I do not find this to be so.

[26] The liquidator has explained that from as early as November 2002 he had addressed correspondence to APP at its Pioneer Road address which APP had received. However, according to the liquidator, one of his former staff, a Mr. Tan Chee Wee was informed over the phone by a representative of APP that correspondence was not to be addressed to APP at its Pioneer Road address but instead should be addressed to APP at its City House address. But according to the liquidator, when correspondence was directed to APP's City Llouse address, it was returned in April 2003. The liquidator goes on to explain that on 9 May 2003 a search was done on APP to ascertain its

registered address which revealed the Loyang Drive address. Then on 11 June 2003 the liquidator received a letter from APP dated 3 June 2003 carrying the Loyang Drive address, enquiring about the status of the liquidation of BPP1, to which letter the liquidator immediately replied on 13 June 2003 enclosing copies of the first and final notice to contributories as well as a notice to submit proof of debt. APP is highly critical of the liquidator's explanation for having sent the notices to the City House address and describes it as a bare assertion without details of which representative of APP the liquidator's former staff had spoken to; when this alleged telephone conversation took place or any evidence of this conversation ever having taken place. APP also questions why, if the liquidator could conduct a search on APP on 9 May 2003, such a search was not done before sending the notices.

[27] With all respect to APP, it is convenient with the benefit of hindsight to say what could and should have been done and what details of APP's representative with whom the liquidator's former staff had spoken to should have been recorded, but I do not think that at the material time when those events were unfolding the liquidator or his staff could have anticipated the need for such particulars in these proceedings.

[28] I should further say that the liquidator's explanation takes the sting out of APP's complaints since his explanation shows why the notices were sent to the City House address and not the Pioneer Road address to which the liquidator was already directing correspondence with APP as early as November 2002. In fact in his letter of 6 November 2002 addressed to APP at is Pioneer Road address the liquidator had already informed APP that APP has not paid for the 117,000,000 shares. In the light of the liquidator having done so, it is difficult to attribute to the liquidator any dark motives in having sent the notices to the City House address. His having done so is consistent with his former employee having received such a request.

[29] In my judgment the far more important question to ask is: Did APP suffer substantial injustice or prejudice as a result of the notices being sent to APP's City House address? According to APP it has suffered prejudice because the notices were meant to notify APP of crucial meetings where APP's financial fate was to be decided. According to Mr Ferry Siswojo Djongianto (who affirmed an affidavit on behalf of APP on 22 March 2004 opposing the application), 'Had APP attended, APP would have pointed out that it had not been issued the shares the liquidator alleges were issued to APP, and further that all capital contributions were to be set of, as agreed by the shareholders of the respondent'. APP further contends that because of its

absence, there was no quorum for the contributories' meeting which rendered that meeting defective. I do not agree. I do not find that APP had suffered the prejudice it alleges.

[30] With regard to APP's allegation that if it had attended the contributories' meeting it would have pointed out at the meeting that 'it had not been issued the shares', it is pertinent to note that in para 6 of his affidavit affirmed on 1 December 2003 in support of this application, Mr Yew Fooi, the liquidator states that APP was issued a total number of 252,579,215 shares for which RM135,579,215 was paid up and RM117,000,000 remained in arrears. Mr Ferry Siswojo Djongianto (in paras 63 and 65 of his affidavit of 22 March 2004) refers to what Mr Yew Fooi said about the issuance of 252,579,215 shares to APP and said 'Besides making the bald allegation that these shares were issued, the liquidator does not give any evidence of such issuance'. Mr Ferry Siswojo Djongianto went on further to say Without a shred of evidence that shares amounting to RM117,000,000 have been issued, to APP, the liquidator cannot be allowed to make a call on these phantom shares'. This cannot be true and I do not accept what APP says about not being issued 117,000,000 shares because the liquidator has produced the following evidence as proof that pursuant to APP's share application form, a total of 117,000,000 ordinary shares of RM1 each were allotted and issued to APP on 5 May 2000:

(i) APP's share application form dated 5 May 2000 to BPP1 for 117,000,000 shares;

(ii) BPP1 Director's Circular Resolution and Members' Circular Resolution both dated 2 May 2000 on the authority for allotment of APP's 117,000,000 shares;

(iii) BPP1 Director's Circular Resolution dated 5 May 2000 for the allotment of APP's 117,000,000 shares as unpaid shares;

(iv) Share Certificate No 016 in favour of APP dated 5 May 2000 in respect of the 117,000,000 shares in BPP1;

(v) APP's Director's Resolution dated 23 February 2001 recognising that on 5 May 2000 BPP1 had issued the 117,000,000 ordinary shares to APP;

(vi) Director's Report and Audited Financial Statements of BPP1 for the year ending 31 December 2000.

[31] Quite apart from the fact that there would have been no truth in what APP would have pointed out at the contributories' meeting. I had earlier mentioned that the liquidator received a letter from APP dated 3 June 2003 enquiring about the status of the liquidation of BPP1, which the liquidator

immediately replied to APP on 13 June 2003 using the Loyang Drive address enclosing copies of the first and final notice to contributories dated 17 March 2003 and 2 April 2003 respectively as well as a Notice to Submit Proof of Debt. The last paragraph of the liquidator's letter of 13 June 2003 clearly indicates to APP that a call would soon be made for the 117,000,000 unpaid shares. It reads:

> We notice that you have unpaid shares of RM117,000,000 in BPP1. In the conduct of liquidation, we will soon call for payment of unpaid shares. To assist us in moving forward to complete the liquidation, we would appreciate if you could provide us with the latest update of the debt moratorium taken by APP as well as APP's ability or proposed scheme (together with the relevant announcements, notices and scheme papers, if any) to settle the call in part or in full.

[32] The liquidator says he never received any reply from APP to any of his letters to them. He even wrote a further letter to APP dated 4 March 2004 noting their failure to respond and enclosing a copy of the liquidator's report filed on 2 June 2003.

[33] Now, if APP genuinely regarded the contributories' meeting as crucial to its financial fate and had felt gravely prejudiced at not receiving the first and final notice to contributories as alleged, then it was open to APP to apply to court pursuant to rr 70, 71 and 193 of the Winding-Up Rules to object to the list of contributories finally settled by the liquidator, but no such steps have been taken by APP.

[34] With regard to APP's contention that because it did not attend the contributories' meetings there was a lack of quorum, I find no substance in this contention. Under r 69 of the Winding-Up Rules:

> On the day appointed for settlement of the list of contributories the liquidator shall hear any persons who objects to being settled as a contributory, and after the hearing shall finally settle the list in Form 37, which when so settled shall be the list of contributories of the company.

[35] So a proper reading of the rule shows that there is in fact no 'meeting' held at which a quorum of any sort is required to settle the final list of contributories.

[36] Having found that APP has not suffered any substantial injustice or prejudice from the liquidator's sending the first and final notice to contributories to the City House address, I find this an appropriate case to apply r 194 (1) of the Winding-Up Rules to hold that the contributories' meeting of 26 March 2003 was not defective or invalid. It was for these reasons too that I had earlier said that if the liquidator had needed to apply

for leave to serve the SIC on APP in Singapore such leave would be granted.

APP's alleged right to set off the RM117m against sums already owing by BPP1

[37] APP also contended that if it had received the first notice to contributors and had attended the contributories' meeting it would have informed the meeting about its right to set off its capital contributions against what it was owed by BPP1. According to APP even if it had received all the issued shares and is liable for the amount of RM117,000,000, APP would still not be liable after this sum is set off against the sums owing to APP by BPP1. I do not agree.

[38] I do not think it is open in law for AP to contend that it may unilaterally set off credit amounts from its liability for the unpaid capital. Section 245(1) of the Act provides that:

> The court may make an order directing any contributory for the time being on the list of contributories to pay to the company in the manner directed by the order any money due from him by virtue of any call in pursuance of this act, and may:
>
> (a) in the case of an unlimited company, allow to the contributory by way of set-off any money due to him … on any independent dealing or contract but not any money due to him as a member of the company in respect of any dividend or profit; and (b)
>
> (b) in the case of any company whether limited or unlimited, *when all the creditors are paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call*. (Emphasis added.)

[39] It is clear from the above provision that until all creditors of BPP1 have been settled in full leaving only the position of an adjustment between contributories, APP does not have a right of set-off on its liability on a call for the unpaid capital. As can be seen from the estimated liquidation accounts of BPPl as at 18 November 2003 produced as exh 'YF–9' to Yew Fooi's affidavit of 1 December 2003, the total assets of BPPl without the unpaid share capital of APP, amounting to about RM150 million would on the face of it be insufficient to meet the total allocation for secured and unsecured creditors amounting to about RM216.43m (secured creditors — RM87.22m plus unsecured creditors — RM 129.21m).

[40] The rationale behind the provision in s 245(1) of the Act is explained in *Re Overend, Gurney & Co* [1865-1866] 1 LR Ch App 528 at 536. It is to avoid the effect of set-off against a call wherein an unsecured creditor will be elevated and treated as a secured creditor.

[41] This will be an appropriate place to also address some of the other complaints raised by APP in the course of arguments. APP contended that it was prejudiced when the liquidator wrote to it on 13 June 2003, but did not extend the deadline of 15 June 2003 for APP to file its proof of debt and so, by the time APP had received the letter, the deadline would have passed already.

[42] But even if the deadline had passed APP is not precluded from availing itself to the provisions of r 91(1) and (2) of the Winding-Up Rules and filing its proof of debt even at this stage for the liquidator to consider. Further, I agree with counsel for the liquidator that contrary to APP's assertion and belief that the liquidator has already shown bias against any proof of debt submitted by APP, the examination of any proof of debt be it from APP or otherwise by the liquidator is governed by r 92 of the Winding-Up Rules. Any rejection must be supported by written grounds and not at his own whims and fancies.

[43] APP also contended that there is a duty on the liquidator's part, in making the call, to show that APP is able to meet its debts but the liquidator would have been unable to do so given APP's moratorium on payment of all its debts. According to APP this was another reason why the liquidator did not apply for leave to serve out of the jurisdiction, since it would then have been obliged to give evidence to assure the court that APP would have been able to meet its debts. I do not agree. In view of the provisions of s 245 (2) of the Act, it is clear that a contributory may partly or wholly fail to pay on a call. The relevant parts of s 245 (2) reads:

> The court may either before or after it has ascertained the sufficiency of the assets of the company —
>
> (a) make calls on all or any of the contributories for the time being on the list of contributories, to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company and the costs charges and expenses of winding up and for the adjustment of rights of the contributories among themselves; and
>
> (b) make an order for payment of any calls so made,
>
> and in making a call may take into consideration the probability that some of the contributories may partly or wholly fail to pay that call.

Was this application made in bad faith?

[44] APP contends that this application is made in bad faith and an abuse of the process of court as the liquidator has acted in collusion or concert with

the other shareholders of BPP1, namely, STIDC, SFSI and the liquidators of BPP2 so as to exert pressure on APP at a time when APP was involved in a dispute in BPP2 ie, the BPP2 Dispute, so that APP will be brought to its knees and the BPP2 proceedings will be derailed.

[45] When APP refers to the BPP2 Dispute, it is referring to an application made to the Winding-Up Court in Companies-Winding-Up No 28–33 of 2002–III(I) by the liquidators of BPP2 to discharge themselves and for BPP2 to be dissolved on the ground that the liquidators there had realised so much of the property and assets of BPP2 as can in their opinion be realised and a Final Report had been filed. However, that application was objected to by APP who filed an application seeking the leave of that Winding-Up Court to commence and prosecute proceedings, in APP's own name and/or on behalf of BPP2, against the liquidators of BPP2 for any misfeasance in such manner as APP may be advised. Hence the term the BPP2 Dispute. In the BPP2 Dispute APP also made allegations that the same parties mentioned herein had colluded in that dispute to cause loss to APP and to unjustly enrich STIDC there but those allegations were rejected by the court there when it dismissed APP's application to bring malfeasance proceedings in the BPP2 Dispute.

[46] In this application APP accuses the liquidator of taking instructions from the three minority contributories to act against APP and had communicated with STIDC and other contributories about possible action against APP, the majority contributory and says it was only after STIDC advised the liquidator to proceed that the later did. To illustrate the point it made APP referred to a letter dated 4 November 2003 written by the liquidator to the other contributories ie, STIDC, SFSI and BPP2, which stated:

> As you are aware, APP is obliged to BPP1 for unpaid capital in the sum of RM117,000,000.
>
> In the recent court proceedings before the liquidation court of BPP2, APP had suggested that the obligation is not to be recognised until a call is made.
>
> Originally, my intention was to solicit your views on the question of call after the Framework Agreement was completed. But in view of, among other matters, the aforesaid court proceedings, completion of that Agreement is now likely to be extended into early next year.
>
> Accordingly, I now write to you to enquire whether you would require me to proceed with a call and if so, I will then make a formal application to court now without first awaiting the completion of the. Framework Agreement.
>
> May I please hear from you soonest possible.

[47] In my judgment the above quoted letter, far from serving APP's

purposes in fact provides the answer to APP's complaint about the liquidator's alleged collusion with the other contributories because the liquidator states in the second paragraph of that letter that i*n recent court proceedings (ie the BPP2 Dispute) before the liquidation court of BPP2, APP had suggested that the obligation (ie, to pay the sum of RM117,000,000 for unpaid capital) is not to be recognised until a call is made*. So it was the stance or position taken by APP about the RM117,000,000 for the unpaid capital in the BPP2 Dispute, namely, that unless a call was made there is no obligation to pay the RM117,000,000, that precipitated this application.

[48] With regard to APP's allegation that the liquidator was acting on the directions of STIDC and the other contributories and in collusion with them, I do not find this to be so. As the following facts will show there is no substance to APP's allegation.

[49] When introducing the background facts at the beginning of this judgment, I referred to the fact that when the State Government of Sarawak resumed all the Industrial Forest Lands in 2002 it awarded compensation. The resumption exercise and who should benefit from the compensation awarded became an issue of concern to the liquidator. In the following paragraphs of his affidavit of 5 April 2004, Yew Fooi the liquidator explained the issue and how it was resolved through the framework agreement:

> 9. The Resumption Exercise (which was carried out before BPP1 went into liquidation) became an issue of concern to me as liquidator of BPP1 given the following broad issues that became apparent from the exercise:
>
> (a) STIDC was or should have been obliged to the State Government for outstanding lease premium previously agreed as payable on deferred terms but yet to be fully settled at the time of the Resumption Exercise ('Lease Premium Issue');
>
> (b) there was an adjustment issue between STIDC and BPP2 arising from amongst other things, the JVA and the Sub-Lease in respect of the Industrial Forest Lands, in that the BPP2 shares were not issued to STIDC;
>
> (c) BPP2 had posted a claim against BPP1 for the balance rental under the Sub-Lease.
>
> 10. It was against that backdrop that the Framework Agreement referred in the liquidator's 1st Affidavit was negotiated and executed by the relevant parties.
>
> ...

34 As can be gathered from the Framework Agreement, the entire proceeds of the Resumption Exercise (including the account by STIDC for the Lease Premium Issue) were resolved in favour of BPP1.

[50] It will be seen from what is stated above by the liquidator that contrary to APP's accusation about his collusion with the other contributories and his acting on their directions, the liquidator in fact acted in the best interest of BPP1 and the entire proceeds of the resumption exercise were resolved in favour of BPP1.

[51] APP has also alleged that in entering into the framework agreement the liquidators of BPP2 had acted against the advice of their own legal advisers, namely, M/S Sri Ram & Co, and that the liquidator here had conspired with the liquidators of BPP2 to do so. But Mr. Yew Fooi the liquidator here has stated in para 35 of his affidavit of 5 April 2004 that he was not even aware of the existence of M/S Sri Ram & Co's advice to BPP2 at the material time and that the views expressed by that law firm do not and have never accorded with the position maintained by Mr Yew Fooi as liquidator of BPP1 upon legal advice obtained by him. So once again, APP has made unsubstantiated allegations against the liquidator.

[52] With regard to the liquidator's letter of 4 November 2003 which APP had held up as illustrative of the liquidator's acting on the instructions of the other contributories, the liquidator has explained that his letter was written in the context of the position arising under the framework agreement and the stance taken by APP as to its liability on the unpaid capital in the BPP2 dispute. Further, taking into account that the ultimate adjustment in the framework agreement arising from a formal call being made would affect the other contributories of BPP1, the liquidator said he sought their views on making the call. I accept the liquidator's explanation for writing that letter as a reasonable one. I also find that the liquidator has not timed the call to coincide with the BPP2 Dispute as alleged. As the facts show, it was APP's stand in the BPP2 Dispute about a formal call having to be made on it to crystallise its liability as contributory to pay the RM117,000,000 that precipitated this application.

[53] APP also accuses the liquidator of abuse of process of court in having filed this application but withheld service of it on APP until the last minute so as to deprive APP of engaging counsel of its choice. I find no merit in this accusation. The facts show that the liquidator tried to serve the application on the firm of Advocates acting for APP in the BPP2 Dispute but that firm declined to accept service on the ground that it had not received instructions to do so. If the liquidator had intended to withhold service for the purposes suggested by APP, then those purposes would surely be defeated by APP

33. As to the Framework Agreement, in addition to what was stated in paras 7 to 10 above, I state as follows:

(a) having consulted lawyers, I was of the view that the entire benefit of the Industrial Forest Lands (that is to say, the proceeds of the Resumption Exercise including the amounts representing the Lease Premium Issue) should be resolved in favour of BPP1 and the position of BPP2 and/or STIDC on those Lands was to be treated as a secondary consequence - this can be seen from the liquidator's report dated 2 June 2003;

(b) on or about 5 August 2003, syndicated lenders comprising Bank Utama (Malaysia) Sdn Bhd, Bumiputra-Commerce Bank Berhad, Citibank Berhad, Amanah Merchant Bank Berhad, Bank Pertanian Berhad and Utama Merchant Bank Berhad ('Secured Lenders') had exercised rights under the historical charges and/or debentures had by them over BPP1 and appointed receivers and managers of BPP1 ('Receivers of BPP1') who had the power to deal with the proceeds of the Resumption Exercise;

(c) STIDC had also stood as one of the guarantors of BPP1 to the Secured Lenders and it was answerable for shortfalls with ancillary rights of recourse against BPP1 ('Subrogation Issue');

(d) exploratory meetings were initiated some time in or about March 2003 with representatives of the parties to the Framework Agreement to discuss the Lease Premium Issue and how and in what manner it could be affected more so with the consequence of the Subrogation Issue;

(e) from April 2003, the position became urgent when STIDC was called upon by the Secured Lenders to make payment to the Secured Lenders and the Subrogation Issue became real with STIDC assuming the Secured Lenders' position and allowing the Receivers of BPP1 to continue in office albeit as their agent;

(f) I was concerned that the Lease Premium Issue had not been resolved on definitive terms. Upon the turning of these events and my protestation as to the Receivers of BPP1 purporting to continue to remain in office, on my part there was urgent need for the Leave Premium Issue to be resolved (if necessary, by way of court proceedings);

(g) to this end, an urgent meeting was called on 28 May 2003 in Kuala Lumpur at the office of my solicitors. After lengthy discussions and negotiations between the parties, the Framework Agreement was eventually finalised and executed on 26 June 2003.

sending as early as 15 December 2003, a copy of the unsealed SIC to APP's advocates in the BPP2 Dispute who would surely have informed APP about it and forwarded a copy of it to them. I do not think it is unreasonable that the liquidator had taken steps to first try to serve the SIC on the lawyers acting for APP in the BPP2 Dispute that was then ongoing. That is what most other lawyers would have done too. So I do not find that the liquidator had abused the process as alleged.

[54] Having dealt with the objections raised by APP I now turn to the liquidator's application. I am satisfied from the evidence before me that presently, APP remains the only shareholder of BPPl with unpaid share capital for the 117,000,000 shares issued to it. Under s 215 of the Act:

> The liability of a contributory shall create a debt accruing due from him at the time when his liability commenced but payable at the times when calls are made for enforcing the liability.

[55] The liquidator's application herein is premised on s 245(2) of the Act which I have already set out above, which is to be read together with s 252(c) of the Act which in its relevant parts provides:

> Provisions may be made by rules enabling or requiring all or any of the powers and duties conferred and imposed on the court by this part in respect of
>
> (c) the making of calls and the adjusting of the rights of contributories;
>
> To be exercised or performed by the liquidator as an officer of the court and subject to the control of the court, but the liquidator shall not make any call without either the special leave of the court or the sanction of the court …

[56] The liquidator has stated in his application that the call is necessary:

(a) to satisfy the debts and liabilities of BPP1;

(b) to pay the costs, charges and expenses of winding-up;

(c) subject to proof, to satisfy the amount of book debts of RM75,083,505 due to APP by way of set-off; and

(d) for the adjustment of rights of the contributories among themselves.

[57] The liquidator proposes to call for the full amount of the unpaid share of RM117,000,000 and has noted that APP has declared a moratorium of debts due to creditors and there is a likely probability that APP may partially or wholly fail to pay the call. These are matters he is entitled to take into account. *McPherson's The Law of Company Liquidation* (4th Ed) by Andrew Keay, quoting *Re Sheilds Marine Insurance Association* [1868] 5 Eq 368 has this to say about the approach to be taken by a liquidator.

In determining whether a call should be made, however, the liquidator is entitled to take into account the probability that some of the contributories may partly or wholly fail to pay the call. Even where the company is solvent and able to discharge its debts in full, the liquidator is entitled and indeed, bound to make calls for the purpose of adjusting the rights of the contributories inter se:

> [I]n a company of limited liability, where there are many shares, some of which are paid up and the rest not paid up, the persons who have paid up in full are not required to be on the list of contributories, but as soon as it is found that there are assets more than sufficient to pay all debts, then calls may still be made on the persons who have not paid up in full, in order to adjust the rights of the shareholders amongst themselves; and persons are not discharged from all liability as shareholders because all claims against the [company] are disposed of if the [company has] claims against them for the purpose of setting right the contributions equally amongst the members'.

Since the object here is to ensure that losses suffered by the company are distributed rateably among all the members in proportion to the amounts subscribed for and not the amounts paid up, it follows that this is as much a purpose of the liquidation for which, in the absence of a contrary provision in the constitution, a call may be made as is the purpose of paying debts and liabilities of the company and discharging the costs and expenses of the winding up.

[58] In the result I find that the liquidator's application is properly made in the performance of his duties as liquidator. There being no committee of inspection in this case, I grant the liquidator leave to make the call as prayed for. I also order that in the event of failure by APP to settle the amount of RM117m within 30 days of the call issued by the liquidator, the liquidator is at liberty to charge APP interest at the rate of four centum per annum from the date of judgment to date of payment. The liquidator's costs of this application is to be taxed and paid by APP.

Order accordingly.

Reported by Sally Kee